No. 672

In the Supreme Court of the United States

OCTOBER TERM, 1941

SIMON L. LOEB, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 572

SIMON L. LEVY AND CHARLES B. LEVY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 448–455) is reported at 138 F. (2d) 429.

JURISDICTION

The judgment of the circuit court of appeals was entered November 3, 1943 (R. 456), and a petition for rehearing (R. 457–471) was denied December 2, 1943 (R. 473). The petition for a writ of certiorari was filed January 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI

and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in a trial on a charge of using the mails to defraud, the court committed reversible error in permitting the prosecution to bring out on cross-examination of petitioner Simon L. Levy that in 1927 he pleaded nolo contendere to a mail fraud charge and was fined, and in permitting the jury to consider such evidence on the questions of this petitioner's credibility and intent.

STATEMENT

On September 26, 1942, petitioners and others were indicted, in the District Court of the United States for the Southern District of Indiana, in six counts (R. 2–17), five of which charged them with having used the mails in execution of a scheme to defraud in connection with the distribution of prefabricated houses,[1] in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 2–13); the sixth count charged them with conspiring to do the acts alleged in the other counts, in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 13–17). Petitioners were tried before a jury, which found them guilty on all six counts

[1] The details of the scheme as charged and the evidence relied upon to establish it and the accompanying misrepresentations are summarized in the opinion of the circuit court of appeals (R. 448–450, 450–453).

(R. 425). They were each sentenced generally to imprisonment for five years and to pay a fine of $500 (R. 428). Upon appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the convictions (R. 456) and thereafter denied a petition for rehearing (R. 473).

At the trial, petitioner Simon L. Levy took the stand as a witness for the defendants (R. 257) and on cross-examination by government counsel testified that on November 5, 1927, he pleaded nolo contendere in the District Court for the Northern District of Illinois to a charge of using the mails in execution of a scheme to defraud and that he was adjudged guilty and fined on each of twelve counts of the indictment (R. 280).[2] In respect of this testimony the court charged the jury:

> * * * Evidence was introduced on behalf of the Government that the defendant,

[2] The testimony in this respect was as follows (R. 280):

"Q. Mr. Levy, are you the same Simon Levy that was adjudged guilty in the United States District Court at Chicago on November 5, 1927, the charge being using the mails in furtherance of a scheme to defraud, and you were fined some three hundreds [sic] on each of twelve counts in the indictment?

"Mr. Royse. To which we object because the evidence is incompetent, and for the further reason that it was nearly twenty years ago and has no bearing on this case whatsoever.

"The Court. I do not think it applies to this case, but he may answer.

"A. Yes.

"Q. State whether or not you are the same Simon Levy

> Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent. [R. 404; see, also, the further instruction at R. 416–417, discussed at pp. 9–10, *infra*.]

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who was involved in the United States District Court in the year 1927.

"A. I was not convicted.

"Q. What do you mean, Mr. Levy?

"A. I mean that I was charged and a compromise was offered by the State's attorney who finally accepted a plea of *nolo contendere*, or some such name.

"Q. Are you the same man?

"A. Yes.

"Q. But the court did enter a judgment that you were guilty of the offense charged and fined you three hundred dollars on each count and costs?

"Mr. ROYSE. We object, as not being competent.

"The COURT. Sustained.

"Mr. PFISTER. That is all."

While the reasoning underlying the judge's rulings on this line of cross-examination is not clear, it is plain from his instruction to the jury in this respect (see quotation from the charge in the succeeding sentence of the text) that he sustained petitioners' objection to only the last question and not to the entire line of cross-examination. Similarly, we submit that petitioner Simon Levy's assertion that he was not convicted, after he testified that he was fined on each count of the indictment shows that he was using "conviction" in the sense of a judgment rendered after a trial and a finding of guilty. Petitioners do not deny that a judgment of conviction was entered on Levy's plea of nolo contendere.

ARGUMENT

Petitioners contend (Pet. 10–14) that since the entry of a plea of nolo contendere does not create an estoppel against a defendant and merely constitutes an admission of guilt for purposes of the case, a conviction based thereon may not subsequently be used for the purpose of impeaching his credibility or proving his intent.

1. It was proper, we submit, for the Government on cross-examination to show petitioner Simon Levy's prior conviction for mail fraud and for the court to permit the jury to consider that fact on the issues of his credibility and intent.[3] When this petitioner took the stand, his credibility, like that of any other witness, was subject to impeachment. *Raffel* v. *United States,* 271

[3] We have assumed that the questions presented are open to petitioner Charles Levy as well as petitioner Simon Levy, since the latter was called as a witness for all the defendants (R. 257). There is considerable doubt as to whether, even if there were merit in petitioners' contentions, the errors were sufficiently prejudicial to justify reversal. The circuit court of appeals in its opinion said (p. 450):

"We agree with the contention that much of the proof, even that offered by the government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as 'puffing' or extolling the merits of their business and product. On the other hand, there are disclosed numerous misrepresentations of fact which we find difficult, if not impossible, to reconcile with defendants' honesty and good faith."

U. S. 494, 497; *United States* v. *Buckner,* 108 F. (2d) 921, 927 (C. C. A. 2), certiorari denied, 309 U. S. 669; *United States* v. *Gross,* 103 F. (2d) 11, 13 (C. C. A. 7); see also *Johnson* v. *United States,* 318 U. S. 189, 195. Consequently, evidence of a prior conviction was, of course, admissible on the issue of his credibility. *Rinella* v. *United States,* 60 F. (2d) 216, 218 (C. C. A. 7); *Jebbia* v. *United States,* 37 F. (2d) 343, 344 (C. C. A. 4), certiorari denied, 281 U. S. 747; *Nutter* v. *United States,* 289 Fed. 484, 485 (C. C. A. 4); *MacKnight* v. *United States,* 263 Fed. 832, 840 (C. C. A. 1). And, since Levy's intent was an essential ingredient of the offense charged, this evidence of a prior conviction for mail fraud, the crime charged in the instant case, was likewise admissible on the question of his intent. *Edwards* v. *United States,* 18 F. (2d) 402, 403 (C. C. A. 8); *Tedesco* v. *United States,* 118 F. (2d) 737, 740 (C. C. A. 9); see *Lynch* v. *United States,* 12 F. (2d) 193, 194 (C. C. A. 4); *Heglin* v. *United States,* 27 F. (2d) 310, 312 (C. C. A. 8); *Edwards* v. *United States,* 249 Fed. 686, 690 (C. C. A. 6), certiorari denied, 248 U. S. 560.

While it is true that a plea of nolo contendere does not estop the defendant from proving his innocence in a civil action, otherwise it is the same as a plea of guilty in a criminal proceeding in that it removes all issues of fact from the case and supports a judgment of conviction. *Hudson*

v. *United States,* 272 U. S. 451, 455; *United States* v. *Norris,* 281 U. S. 619, 622; *Farrington* v. *King,* 128 F. (2d) 785, 786 (C. C. A. 8); *United States* v. *Food and Grocery Bureau of Southern California,* 43 F. Supp. 974, 979 (S. D. Cal.); *State* v. *Suick,* 195 Wis. 175 (1928). And, we submit, that judgment may properly be shown on cross-examination of the defendant in a later criminal prosecution for the purpose of impeaching his credibility (*Fisher* v. *United States,* 8 F. (2d) 978 (C. C. A. 1), certiorari denied, 271 U. S. 666; *State* v. *Hill,* 145 Kan. 19 (1937); *State* v. *Herlihy,* 102 Me. 310 (1906); *State* v. *Henson,* 66 N. J. Law 601, 609 (1901); *State* v. *Radoff,* 140 Wash. 202, 205 (1926)), and for the purpose of showing his intent.[4]

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[4] Compare *United States ex rel. Bruno* v. *Reimer,* 98 F. (2d) 92 (C. C. A. 2), where it was held that a conviction based on a plea in the nature of nolo contendere together with a subsequent conviction were sufficient to support an order of the Secretary of Labor that the petitioner be deported as an alien "who was twice sentenced to imprisonment * * * because of conviction in this country of a crime involving moral turpitude," the court saying: "Since it [deportation] depends on conviction and sentence, conviction and sentence are the only relevant facts, and the accused may be deported whenever these have been procured by any lawful procedure" (p. 93). Similarly, in the instant case, petitioner's prior conviction, which is undisputed, could be shown, regardless of whether he pleaded guilty, not guilty, or nolo contendere to the indictment. It is the fact of conviction, rather than the defendant's plea, which furnishes the basis for its admission. Compare,

Whether the prior conviction was so remote as to have no materiality (see Pet. 12–13) was properly a question for the trial judge in the exercise of a sound discretion. *Teese* v. *Huntington*, 23 How. 2, 14; *Fire Ass'n of Philadelphia* v. *Weathered*, 62 F. (2d) 78, 79 (C. C. A. 5); *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2).[5] The prior conviction, it is true, occurred approximately 15 years previously, but in view of the similarity of the prior charge to the one on trial, we submit that there was no abuse of discretion in admitting the evidence. And having admitted it, the judge properly, and indeed to the advantage of the defendants, left to the jury the determination of the weight to be accorded to it solely on the issues of petitioner Simon Levy's credibility and intent. *Murray* v. *United States*,

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also, *State* v. *LaRose*, 71 N. H. 435 (1902), relied upon by petitioners (Pet. 11), in which evidence of a plea of nolo contendere, without a showing that a judgment of conviction was entered thereon, was held inadmissible in a later criminal proceeding. To the same effect, see *State* v. *Conway*, 20 R. I. 270 (1897).

[5] See, also, *Packer* v. *United States*, 106 Fed. 906, 909 (C. C. A. 2) (one-year time interval, but matter of time said to "rest practically in the discretion of the trial judge"); *Wolfson* v. *United States*, 101 Fed. 430, 433 (C. C. A. 5), certiorari denied, 180 U. S. 637 (over three years); *Walsh* v. *United States*, 174 Fed. 615 (C. C. A. 7), certiorari denied, 215 U. S. 609 (12 years); *Kettenbach* v. *United States*, 202 Fed. 377, 384 (C. C. A. 9) (reports going back seven years were admitted).

288 Fed. 1008, 1014 (App. D. C.), certiorari denied, 262 U. S. 757; cf. *Mudsill Mining Co.* v. *Watrous*, 61 Fed. 163, 179–180 (C. C. A. 6). In any event, however, the evidence was not "of sufficient weight to make reversible error." *United States* v. *Shurtleff, supra.*[6]

2. The court's instruction to the jury (*supra*, pp. 3–4), of which petitioners complain (Pet. 10–14), plainly shows that the testimony concerning petitioner Simon Levy's prior mail fraud conviction was, as we have shown, properly limited to the issues of his intent and credibility. But, assuming *arguendo* that consideration of the conviction for even these limited purposes was erroneous, petitioners failed properly to preserve the point in the trial court. After the judge had instructed the jury, he accorded petitioners a full opportunity to except to the charge; and the court, in an obvious effort to avoid any possibility of error, amended the instructions in accordance with petitioners' requests (R. 416–417). More specifically, petitioners challenged the instruction relating to the prior conviction on the sole ground that the court should not have used the word "conviction" in the instruction. In compliance with petitioners' desires, the court struck "conviction" from the instruction and changed it to state that petitioner Simon Levy "was involved in a con-

[6] See footnote 3, *supra*, p. 5.

troversy in the Federal Court" (R. 416–417).[7] Petitioners specifically advised the court that with this modification the instruction was satisfactory and that they took no exception to it (R. 417). Accordingly, they did not assign it as error on appeal (R. 433–434); it was in the petition for rehearing in the court below that the question was raised for the first time (R. 460–467).

In these circumstances it is plain that petitioners waived their objection to the cross-examination of Simon Levy concerning his prior conviction by "acquiescing in the treatment of the matter by the court." *Johnson* v. *United States*, 318 U. S. 189, 200. It is true, as petitioners state (Pet. 16–17), that this Court may of its own motion notice serious error;[8] but, "we are not here dealing with inadvertence or oversight," and it is plain that counsel " 'consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied' " (318 U. S. at

[7] Petitioners do not suggest that the instruction was erroneous because it permitted the jury to consider mere involvement in a controversy in the federal courts on the issues of intent and credibility. And in the circumstances of this case we do not believe that such a contention might be urged successfully, for it was at petitioners' request that the correct instruction was amended to their advantage by omitting reference to the fact of conviction, which petitioners claim (Pet. 8–9) operates to prejudice a jury.

[8] Cf., however, the quotation from the opinion of the circuit court of appeals in footnote 3, *supra*, p. 5, as to strength of the Government's case.

200).[9] Now to recognize petitioners' belated challenge is to "permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him" (318 U. S. at 201). The fact that petitioners specifically agreed to the instruction, as modified at their request, and did not assign it as error, "makes clear that the point now is a 'mere afterthought' " (318 U. S., at 201).[10]

[9] Different counsel are now representing petitioners (R. 25).

[10] Petitioners have singled out from the court's charge to the jury on the question of intent its reference to the rule that persons are presumed to intend the natural and probable consequences of their acts, and on the authority of *Hibbard* v. *United States*, 172 Fed. 66 (C. C. A. 7), they contend that this was prejudicial error in that it rendered unnecessary proof of specific intent (Pet. 14–15). Petitioners did not except to the charge in this respect (R. 416–418) or assign it as error in the court below (R. 433–434). Moreover, the language complained of, when restored to its context, was directly modified by a full discussion of the intent question, in which the court made abundantly clear the Government's burden of proving intent beyond a reasonable doubt (R. 405–409). Compare *Walsh* v. *United States*, 174 Fed. 615, 619 (C. C. A. 7), certiorari denied, 215 U. S. 609, in which the same court which decided the *Hibbard* case distinguished it on the ground that other parts of the charge, as in the instant case, made it clear that the burden of proving intent beyond a reasonable doubt remained with the Government. Compare, also, *Agnew* v. *United States*, 165 U. S. 36, 50–51; *Grayson* v. *United States*, 107 F. (2d) 367, 369–370 (C. C. A. 8). Irrespective of these considerations, however, petitioners suffered no prejudice. For when the presumption instruction is considered in the light of the subsequent instruc-

CONCLUSION

Petitioners do not challenge the sufficiency of the evidence to support their convictions and their contentions here present no question calling for further review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

EDWARD G. JENNINGS,
W. MARVIN SMITH,
Special Assistants to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

JANUARY 1944.

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tion (R. 414–415) that petitioners' business was on its face a legitimate one, it is plain that the jury was effectively precluded from reasoning that an intent to carry out a fraudulent scheme could be predicated alone upon the inherent nature of petitioners' activities. In short, the instruction that petitioners' business was ostensibly legitimate prevented the operation of the presumption herein attacked by petitioners, and the jury was required to find the fraudulent intent from the direct and circumstantial evidence before it.

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